

United Food & Commercial Workers District Local 368A (Professional Services Unlimited) and Magdalena Pearson. Case 27-CB-3269

May 9, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On October 26, 1994, Administrative Law Judge George Christensen issued the attached decision. The General Counsel filed exceptions with a supporting brief, and the Respondent filed an answering brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ We do not rely on the judge's finding that Pearson took advantage of the hiatus in union-security agreements to avoid dues payments for a substantial period.

Michael D. Pennington, Esq., for the General Counsel.¹
Lester V. Peck, Esq., of Nampa, Idaho, for Local 368A.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On October 12, 1993,² Magdalena Pearson filed a charge and on November 23, Region 27 issued a complaint alleging United Food & Commercial Workers District Local 368A (Union) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) by causing Professional Services Unlimited, Inc. (PSU) to discharge Pearson pursuant to a union-security agreement between the Union and the Employer without giving Pearson adequate notice and an opportunity to remedy her dues delinquency prior to causing her discharge.

The Union conceded it caused Pearson's discharge for failure to cure her dues delinquency and restore herself to good-standing membership in the Union pursuant to the agreement in question but contends that prior to causing her discharge the Union gave Pearson adequate notice and opportunity to cure the delinquency and restore herself to good-standing membership. Therefore the Union did not violate the Act by causing her discharge.

The issue is whether the Union violated the Act by failing to provide Pearson with adequate notice and opportunity to cure her dues delinquency prior to causing her discharge.

¹ Hereafter called the General Counsel.

² Read 1993 after further date references omitting the year.

I conducted a hearing on the issue at Boise Idaho on May 10, 1994.

The General Counsel and the Union appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Both filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following

FINDINGS OF FACT³

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer thereto admitted, and I find at all times material that PSU has been engaged in the business of providing food services to the United States at the Mountain Home Air Force Base, Idaho, valued in excess of \$250,000; PSU had and has a substantial impact on the national defense of the United States; PSU in the course of its business operations annually purchases and receives goods, materials, and services valued in excess of \$50,000 directly from points outside of the State of Idaho; and PSU has been and is an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

The complaint alleged, the answer thereto admitted, and I find at all material times the Union has been and is a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

A succession of contractors has provided meal services at the Mountain Home Air Base for many years. The successive contractors have executed collective-bargaining agreements (CBAs) with the Union which, inter alia, contained agreements requiring all of PSU's dining service employees to acquire and maintain membership in the Union as a condition of continued employment. That union-security agreement has been carried over from one CBA to another, including the currently effective CBA between PSU and the Union.

Pearson has been employed by successive contractors at the base for approximately 12 years as a mess attendant and has been covered by the successive collective-bargaining agreements between the Union and the successive contractors, including PSU.

Pearson became a member of the Union in 1982. She was consistently late tendering dues to the Union after acquiring membership, culminating in her first suspension from good-standing membership on April 1, 1989, for nonpayment of dues for the preceding 2 months.

On April 7, 1989, the Union sent Pearson a letter stating she had not timely tendered \$17 covering her dues for February and \$17 covering her dues for March, for a total of \$34; that she was subject to termination of her employment

³ While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony, therefore any testimony in the record which is inconsistent with my findings is hereby discredited.

per article 3 of the current CBA between the Union and her then employer, Luzon Services, Inc., unless she restored herself to good-standing membership by curing her dues delinquency; stated it was enclosing a copy of a letter the Union was sending the same date (April 7) to Luzon Services, Inc. informing Luzon of the delinquency, her suspension from membership, and requesting her termination pursuant to article 3 unless she cured her delinquency within the 7 days specified in the union-security agreement between Luzon and the Union. The Union dispatched the original of the copy it furnished Pearson to Luzon the same day, advising Luzon that Pearson's union membership had been suspended for dues delinquency, advising Luzon that Pearson had been notified of the delinquency, and requesting that Luzon terminate Pearson if she did not cure the delinquency within 7 days, as provided by article 3 of the CBA. On April 13, 1989, 6 days later, Pearson restored herself to good standing by tendering \$51 to the Union covering dues for the months of February, March, and April 1989. The Union thereupon notified Luzon that the dues delinquency had been resolved and withdrew its request for her termination.

Pearson continued to maintain good-standing membership in the Union until early 1992,⁴ when she again ceased to tender dues, resulting in her second suspension from union membership in February 1992.

The Union did not seek to affect her employment status because no union-security agreement was in effect between the Union and PSU between March and September 1993 (the current CBA between PSU and the Union was executed on August 24, 1992, retroactive to March 1, 1992, and expiring September 30, 1994). In December 1992, Pearson resumed tendering dues to the Union, tendering 1 month's dues to the Union which the Union credited as payment of her dues for the month of November 1992, and reinstated her to good-standing membership. Pearson tendered dues for another month in January 1993, which the Union credited as payment of her dues for the month of December 1992.

Pearson again ceased tendering dues to the Union following the January 1993 tender, and failed to tender dues to the Union for the months of January through July 1993.

Pearson was fully aware between January and July that a union-security agreement was in effect between PSU and the Union requiring her to maintain good-standing membership in the Union as a condition of continued employment. Nevertheless, she ceased tendering dues to the Union during that period, claiming other employees within the unit covered by the CBA between the Union and the successive contractors had not paid dues to the Union, with no effect on their employment status (as of course occurred when her membership was suspended for nonpayment of dues during the contract hiatus period). She heard Idaho was a right-to-work State and the unit employees were not obligated to pay dues to the Union and a unit employee (Valerie Spurgeon) was refusing to pay dues and challenging the right of the Union to require union membership as a condition of continued employment.⁵

⁴Though she continued to follow the practice of refraining from tendering dues payments until the time she risked another suspension.

⁵Pearson was interviewed by an investigator processing Spurgeon's claims.

In June 1993 the Union elected a new President, Everett Grimes.⁶

Hearing unit employee complaints they were paying dues but other unit employees were not, Grimes conducted an audit which disclosed a number of the unit employees were not current in their dues payments. He dispatched a list to PSU naming the delinquents and the amount each delinquent owed. He also dispatched letters to the delinquents, including a July 27 letter to Pearson stating the union records indicated she had not paid dues for the months of January through July for a total dues obligation of \$119 (\$17 monthly dues times 7), requested she cure the delinquency, advised her she was required under the PSU-Union agreement to maintain good-standing membership in the Union by timely paying dues, and that the Union was sending a copy of its July 27 letter to PSU notifying PSU of the delinquency.

On August 3, Grimes conducted two meetings with unit employees. Pearson was present at both meetings. Grimes informed the unit employees at both meetings that the current agreement between PSU and the Union required their maintenance of good-standing membership in the Union as a condition of continued employment, this meant they had to keep their dues current, they risked termination of their employment if they failed to do so, and that the Union intended to enforce their dues obligation under the PSU-Union agreement. Spurgeon challenged the right of the Union to enforce the union-security agreement under Idaho's right-to-work law and Grimes responded by reading a 1990 letter stating that law was inapplicable, inasmuch as the unit employees were working on Federal property for an employer performing work for a Federal entity.

When Pearson received her paycheck on August 10, she noted PSU deducted \$136 from her wages for remittance to the Union to cover her dues delinquency (dues for January through July 1993), plus dues for the current month (August 1993). She telephoned Grimes, informed him she did not sign nor remit to PSU the dues-deduction authorization attached to the July 27 letter she received from the Union and asked him what he knew about the deduction. Grimes informed her he was unaware of the deduction, she would be entitled to a refund, and the Union would give her a refund if that was what she desired. She indicated she wanted a refund.

In late August the Union's secretary received checks for \$20 from Pearson and \$136 from PSU. She credited the two checks in Pearson's dues record as payment of union dues for the months of January through September 1993, plus \$3 towards the October 1993 dues and sent a letter to Pearson advising her the Union had received the two checks, that the Union had credited Pearson's dues records for full payment of dues through the month of September plus a \$3 credit towards October dues, and asked Pearson if she wanted a refund of her \$20 tender, inasmuch as September dues were not due until mid-September.

On September 14, Pearson telephoned Grimes and stated she wanted the sum PSU deducted from her paycheck refunded. Grimes asked if she wanted to apply any portion of the sum to cure her dues delinquency. She replied in the neg-

⁶The complaint alleged, the answer thereto admitted, and I find at all pertinent times Grimes was an officer, supervisor, and agent of the Union acting on its behalf within the meaning of Sec. 2 of the Act.

ative, stating she wanted the entire amount. Grimes stated the Union would comply with her request, informed her she would then be delinquent in her dues obligation to the Union and advised her the Union would exercise its right to seek the termination of her employment for her failure to regularly tender dues to the Union to maintain good-standing membership in the Union, as required under the PSU-Union union-security agreement.

The next day Grimes sent a letter to Pearson stating she was advised by the Union on July 27 she was delinquent in payment of dues for 7 months (and warned under the union-security agreement she risked discharge if she did not cure the delinquency) and enclosing both a check for \$136 and a copy of a letter the Union sent to PSU the same date requesting her discharge for failing to cure her dues delinquency, unless she cured the delinquency within the next 7 days.

Pearson's only response was the remittance of a check to the Union for \$17.

Thus by September 22 (almost 2 months after Pearson's receipt of the union letter notifying her of the 7-month delinquency in her dues and warning of the consequences of non-payment; approximately 30 days after her receipt of the union letter notifying her of the Union's receipt of her August 1993 tender of dues for 1 month, its receipt of the remittance from PSU, its repetition of Grimes' August 3 warning she risked termination if she did not timely tender dues; 8 days after Grimes advised her the Union was going to exercise its right to secure her discharge for the 7-month delinquency when she refused to apply any portion of the PSU remittance towards that obligation; and 7 days after her receipt of a copy of the union letter requesting her discharge unless she cured her dues delinquency within the next 7 days), Pearson's only effort to satisfy her dues obligation was a tender of \$37 to the Union—slightly in excess of the amount necessary to pay dues for 2 months—to cure her 7-month dues delinquency.

On September 23, PSU's project manager, Ms. Gibbs, called Pearson to her office after Pearson completed work that day and advised Pearson her employment was terminated pursuant to the union request unless she worked out an arrangement satisfactory to the Union resolving her dues delinquency. Gibbs suggested Pearson contact the Union to see what she could do to satisfy her dues delinquency and asked Pearson to notify her if she was successful.

Pearson left Gibbs' office, telephoned the union office, and asked for Grimes. The union secretary informed Pearson he was unavailable. Pearson neither left word for Grimes to call her nor made any further effort to reach him that day, but telephoned Gibbs and told Gibbs she had not been able to reach Grimes and work out anything.

Sometime between September 24 and 28, Pearson contacted Grimes. Pearson offered to pay 1 month's dues each month plus \$10–\$15 each month towards her dues delinquency if the Union would withdraw its request for her discharge. Grimes accepted the offer and promptly notified PSU that Pearson had resolved her dues delinquency on a basis satisfactory to the Union and requested Pearson be reinstated.

Gibbs agreed to reinstate Pearson, telephoned Pearson, and requested she return to work. Pearson returned to work on September 29, and has been steadily employed since that date.

As noted heretofore, 13 days later Pearson filed a charge with the Region seeking 4 days of backpay for the time she was off work between September 24 and 28.

Since September 29, each month Pearson has paid dues for 1 month, but only \$1–\$3 each month rather than the \$10–\$15 she promised to pay each month towards her total dues delinquency.

While Spurgeon has continued to refuse to pay dues to the Union, the Union has refrained from taking any action affecting her employment (refraining as well from taking any action against Pearson over her failure to perform her agreement to pay \$10–\$15 per month to cure her total dues delinquency). Grimes explained the Union has refrained from taking any action because the Union is uncertain since its receipt of the Pearson charge filed with the Region and its issuance of a complaint against the Union, just what notices it has to supply to a dues-delinquent unit employee prior to causing his or her termination pursuant to the PSU-Union union-security agreement, and the Region has refused to respond to his request for advice concerning what notices would be sufficient to lawfully cause such terminations.

B. Analysis and Conclusions

In an unbroken line of decisions over the past 30 years, the National Labor Relations Board—with court approval—has declared a union causing an employer to discharge an employee pursuant to a union-security agreement because of the employee's failure to satisfy his or her dues paying obligation under the agreement has a fiduciary duty to treat the employee fairly to assure the noncomplying employee made a conscious choice to evade his or her obligation and had not complied with his obligation through ignorance or inadvertence.

Thus the Board (and approving courts) have ruled a union violates Section 8(b)(1)(A) and (2) of the Act unless prior to causing an employer to discharge an employee for failing to maintain good-standing union membership by timely tender of dues to the union:

1. The union is party to a valid union-security agreement with the employer covering the employee which requires the employee to maintain good-standing membership in the union as a condition of continued employment;

2. Prior to causing the discharge, the union has notified the employee:

a. He or she is delinquent in his or her dues obligation.

b. The total sum payable to cure the dues delinquency, the time period covered by the delinquency, and the method used in calculating the delinquency.

c. The date by which the delinquency must be cured.

d. Failure to cure the delinquency will result in the union's causing the employer to discharge the employee.

3. The employee has failed to cure the delinquency by the date specified by the union.⁷

⁷ *International Woodworkers Local 13-433 (Ralph L. Smith Lumber Co.)*, 119 NLRB 1681 (1958), *enfd.* 264 F.2d 649 (9th Cir. 1959); *Electrical Workers Local 801 (General Motors Corp.)*, 129 NLRB 1379 (1961), *enfd.* 307 F.2d 679 (D.C. Cir. 1962); *Hotel Employees Local 568 (Philadelphia Sheraton Corp.)*, 136 NLRB 888

Not losing sight of the purpose for enactment of the proviso to Section 8(a)(3) of the Act permitting the negotiation and enforcement of union-security agreements (to force “free riders” to contribute to the costs for union administration of collective-bargaining agreements negotiated on the employee’s behalf and for his or her benefit), over the past 30 years the Board has also held it will not require strict compliance with the rules specified above to permit an employee who has knowingly and not through inadvertence or ignorance evaded his dues obligation to the union to benefit from his noncompliance with that obligation.⁸

The Union substantially complied with the requirements set out above, for:

1. It is undisputed a valid union-security agreement between the Union and PSU was in full force and effect requiring Pearson, a PSU employee within the unit covered by the agreement, to maintain good-standing membership in the Union as a condition of continued employment;

2. Prior to causing Pearson’s discharge, the Union notified Pearson she was delinquent in the payment of dues for the preceding 7 months which, at the monthly dues rate known to Pearson (stated in her 1989 delinquency notice and reflected by her tender of \$17 in December 1992 for November 1992 dues and in January 1993 for December 1992 dues), totalled \$119 (7 x \$17), a total delinquency which remained constant (in view of her tenders of dues for 2 months in August and September 1993) at the final date set by the Union for cure of the delinquency or discharge (September 22);

3. Prior to causing Pearson’s discharge, the Union notified Pearson she had until September 22 to cure the delinquency (as well as almost 2 months following her receipt of the original notice of the delinquency, a request to cure it and the consequences of failure to do so and over 1 month following the date she and other members were told to cure their dues delinquencies or face discharge);

4. On July 27, August 3, in late August, September 14 and September 15, Pearson was warned she risked discharge if she failed to cure her dues delinquency, with a final deadline of September 22 therefor;

(1962), enfd. 320 F.2d 254 (3d Cir. 1963); *Teamsters Local 182 (Associated Transport)*, 156 NLRB 335 (1965) and 169 NLRB 1143 (1965), enfd. 401 F.2d 509 (2d Cir. 1968), cert. denied 314 U.S. 213 (1969); *Teamsters Local 122 (Augustus A. Busch)*, 203 NLRB 1041 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974); *H. C. Macaulay Foundry Co.*, 223 NLRB 815 (1976), enfd. 553 F.2d 1198 (9th Cir. 1977); *Teamsters Local 291 (Kaiser Industries)*, 236 NLRB 1100 (1978), enfd. 633 F.2d 1295 (9th Cir. 1980); *Teamsters Local 38 (Schenley Distillers)*, 242 NLRB 370 (1979), enfd. 642 F.2d 185 (6th Cir. 1980); *Teamsters Local 150 (Delta Lines)*, 242 NLRB 454 (1979); *Valley Cabinet & Mfg.*, 253 NLRB 98 (1982); *Western Publishing Co.*, 263 NLRB 1110 (1982); *R. H. Macy & Co.*, 266 NLRB 858 (1982); *Teamsters Local 13 (Mobile Pre-Mix Concrete)*, 268 NLRB 930 (1982); *Operating Engineers Local 542C (Ransome Lift)*, 303 NLRB 1001 (1991); *Carpenters Local 296 (Acrom Construction)*, 305 NLRB 822 (1991); *Operating Engineers Local 501 (California Milk Producers)*, 306 NLRB 659 (1992); *IBEW Local 3 (Fischbach & Moore)*, 309 NLRB 856 (1992).

⁸ *Seafarers (Tomlinson Fleet)*, 149 NLRB 1114 (1964); *Teamsters Local 630 (Ralph’s Grocery)*, 209 NLRB 117 (1974); *John J. Roche & Co.*, 231 NLRB 1082 (1977); *Big Rivers Electric Corp.*, 260 NLRB 329 (1982); *IBI Security*, 292 NLRB 648 (1989); *Communications Workers Local 9509 (Pacific Bell)*, 295 NLRB 196 (1989).

5. By September 22, Pearson had failed to cure her 7-month dues delinquency.

From the time she first acquired union membership, Pearson refrained from timely payment of the requisite dues to the Union until her good-standing membership was in jeopardy. She cured her dues delinquency in 1989 only when faced with discharge if she did not do so. She took advantage of the hiatus in agreements between the expiration of an agreement between a prior contractor and the Union and the execution of a new agreement between PSU and the Union to avoid dues payments for a substantial period. She renewed dues tenders after the PSU-Union agreement was executed for only a few months. Her decision to cease tendering dues for the 7 months between January and July 1993 was conscious, deliberate, and neither due to inadvertence nor ignorance. Pearson was fully aware the valid union-security agreement between the Union and PSU required her maintenance of good-standing union membership and meeting that requirement by timely tender of dues to the Union when she refrained from paying dues for the January–July period. Faced with a second threat to her continued employment by virtue of her failure to comply with her dues obligation, she tried to avoid the sanction of employment termination by resorting to the technique she employed following the end of the 1992 contract hiatus, tendering payments, 1 month apart, of dues for 1 month each time; failed to cure her dues delinquency by the final date set therefor by the Union; only after her termination sought an arrangement satisfactory to the Union for curing her dues delinquency; and reneged on the terms of that arrangement following her reinstatement.

The foregoing pictures a recalcitrant employee, fully aware of her dues obligation, the requirements of the union-security agreement and the consequences which resulted from non-compliance, who nevertheless made a conscious and deliberate decision to evade that obligation, suffered the consequences therefor, only then made an effort to meet the obligation, and promptly filed a charge with the Board to avoid any retribution for her failure to meet the terms of her arrangement with the Union for curing her dues delinquency.

To award Pearson backpay for the 4 days between the date the Union caused PSU to discharge her for her failure to cure her dues delinquency after adequate notice and an opportunity to do so and the date she was reinstated would reward an attempt by a “free rider” to evade the requirements of a lawful union-security agreement authorized by the Act, a result the Board does not sanction.⁹

I therefore find and conclude the Union did not violate the Act by causing PSU to discharge Pearson.

CONCLUSIONS OF LAW

1. At all pertinent times PSU was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Everett Grimes was an officer, supervisor, and agent of the Union acting on its behalf within the meaning of Section 2 of the Act.

3. The Union did not violate the Act by causing PSU to discharge Magdalena Pearson pursuant to a valid union-security agreement between PSU and the Union for failure to

⁹ See *Tomlinson*, et al., cited above.

maintain good-standing membership in the Union by timely tender of dues.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

¹⁰If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The complaint is dismissed.

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.